

FILED

NOV 17 1983

ANDER L. STEVAS.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CAPITAL CITIES CABLE, INC.; COX CABLE OF
OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.;
AND SAMMONS COMMUNICATIONS, INC.,

Petitioners,

v.

RICHARD A. CRISP, Director,
Oklahoma Alcoholic Beverage Control Board,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

JOINT APPENDIX

TIMOTHY B. DYK*
JOHN W. ZUCKER
MARIAN E. LINDBERG
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000
*Counsel for Petitioner Capital Cities
Cable, Inc.*

JOHN D. MATTHEWS
BRENT N. RUSHFORTH*
DAVID P. FLEMING
J. CHRISTOPHER REDDING
DOW, LOHNES & ALBERTSON
1225 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 862-8000
*Counsel for Petitioners
Cox Cable of Oklahoma City, Inc.;
Multimedia Cablevision, Inc.; and
Sammons Communications, Inc.*

MICHAEL C. TURPEN
ROBERT L. McDONALD*
JAMES B. FRANKS
LYNN BARNETT
OFFICE OF THE ATTORNEY GENERAL
OF OKLAHOMA
112 State Capital Building
Oklahoma City, Oklahoma 73105
(405) 521-3921
Counsel for Respondent

* *Counsel of Record*
November 17, 1983

Petition for Certiorari filed May 3, 1983.
Certiorari Granted October 3, 1983.

TABLE OF CONTENTS

	<u>Pages</u>
I. Relevant Docket Entries	1
II. Complaint, March 3, 1981	5
III. Preliminary Injunction Hearing, March 6, 1981	13
IV. Order of the Supreme Court of the United States Granting the Petition for a Writ of Certiorari, October 3, 1983	43
<hr style="width: 20%; margin-left: 0;"/> Pursuant to Supreme Court Rule 30.1, the following documents are not reprinted in the Joint Appendix because they appear on the following pages in the Appendix to the Petition for a Writ of Certiorari:	
A. Opinion of the United States Court of Appeals for the Tenth Circuit, January 24, 1983	1a
B. Order of the United States Court of Appeals for the Tenth Circuit Denying Petition for Rehearing, March 21, 1983	26a
C. Order of the United States Court of Appeals for the Tenth Circuit Granting Motion for Stay of Mandate, April 4, 1983	27a
D. Findings and Order of the United States District Court for the Western District of Oklahoma Granting Motion for Preliminary Injunction, March 19, 1981	28a
E. Order of the United States District Court for the Western District of Oklahoma (Declaratory Judgment), December 18, 1981	31a
F. Order of the United States District Court for the Western District of Oklahoma (Permanent Injunction), December 18, 1981	32a
G. Opinion of the United States District Court for the Western District of Oklahoma on Summary Judgment, February 10, 1982	34a
H. Constitutional Provisions, Statutes, and Regulations Involved	51a

I

RELEVANT DOCKET ENTRIES

**IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA
(NO. CIV-81-290)**

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
(No. 82-1061)**

and

**SUPREME COURT OF THE UNITED STATES
(No. 82-1795)**

RELEVANT DOCKET ENTRIES

<u>Date</u>	<u>Docket Entry</u>
March 3, 1981	Complaint
March 3, 1981	Plaintiffs' Motion for Preliminary Injunction
March 6, 1981	Preliminary Injunction Hearing
March 19, 1981	Findings and Order of District Court Granting Preliminary Injunction
April 4, 1981	Answer of Defendant
June 1, 1981	Defendant's Amendment to Answer and Motion to Dismiss Complaint
August 3, 1981	Plaintiffs' Motion for Summary Judgment
December 18, 1981	Memorandum Opinion and Order of District Court
December 18, 1981	Order of District Court Granting Permanent Injunction
December 18, 1981	Order of District Court Granting Declaratory Judgment
January 11, 1982	Defendant's Notice of Intent to Appeal to the United States Court of Appeals for the Tenth Circuit
February 10, 1982	Order of District Court Withdrawing Memorandum Opinion filed December 18, 1981
February 10, 1982	Memorandum Opinion and Order of District Court
November 15, 1982	Oral Argument Before the United States Court of Appeals for the Tenth Circuit
January 24, 1983	Opinion of the United States Court of Appeals for the Tenth Circuit
February 7, 1983	Appellees' Petition for Rehearing
March 21, 1983	Order of the United States Court of Appeals for the Tenth Circuit Denying Appellees' Petition for Rehearing

II

COMPLAINT

(March 3, 1981)

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-81-290

CABLECOM-GENERAL, INC.; COX CABLE OF
OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.;
and SAMMONS COMMUNICATIONS, INC.,
Plaintiffs,

v.

RICHARD A. CRISP, Director,
Alcoholic Beverage Control Board,
Defendant.

COMPLAINT

1. Plaintiffs are corporations, duly qualified to do business in the State of Oklahoma. Plaintiffs are the holders of cable television franchises in the State of Oklahoma. Plaintiffs have franchises throughout the State including operations in at least the following counties: Canadian, Cleveland, Grady, Logan, Kay, McCurtain, Jackson, Carter, Ottawa, Oklahoma, Tulsa, Kiowa, Greer and Noble. Many aspects of plaintiffs' operations are conducted under regulations issued by the Federal Communications Commission under the Federal Communications Act of 1934, § 151, et seq.

2. Defendant is the Director and Secretary to the Board of the Alcoholic Beverage Control Board, an agency of the State of Oklahoma charged with primary responsibility for the enforcement of Oklahoma law relating to alcoholic beverages, and is sued here solely in his official capacity.

3. This Court has jurisdiction of this action under 28 U.S.C. §§ 1331, 1343. The amount in controversy exceeds the sum of \$10,000.00, exclusive of interest and costs.

4. As part of their lawful service to subscribers, plaintiffs relay to the subscribers the signals of various television stations, some of which originate outside the State of Oklahoma.

5. Plaintiffs have no contractual relationship with the stations whose signals they carry, pay no fee to the stations for said signals, and have no voice in the programming carried by such stations.

6. Plaintiffs are prohibited by FCC regulations having the force of law and by the Copyright Act, 17 U.S.C. § 111(c)(3), from altering or modifying the signals of the stations they carry except as expressly permitted by such regulations. 47 C.F.R. § 76.55(b). Deletion of commercial messages from such signals would violate both the FCC regulations and the Copyright Act.

7. For many years and continuing to the present, some of the programming relayed to plaintiffs' customers has included advertisements for wine, an alcoholic beverage as defined in Article 27, § 5 of the Oklahoma constitution, and 37 O.S. § 506.

8. Said advertising is lawful where originated, and no provision of federal regulations authorizes plaintiffs to delete it from the signals relayed to plaintiffs' customers.

9. Advertisement of alcoholic beverages within the State of Oklahoma is prohibited by Article 27, § 5, Oklahoma Constitution and 37 O.S. § 516.

10. In *Oklahoma Alcoholic Beverage Control Board v. Heublein Wines, International*, 566 P.2d 1158 (Okla. 1977), the Oklahoma Supreme Court held that the constitutional and statutory advertising prohibitions required broadcast television stations to block out wine advertising in programming delivered to them by the networks.

11. On March 19, 1980, the Attorney General of the State of Oklahoma issued an opinion declaring that the prohibitions on alcoholic beverage advertising applicable to broadcast television apply similarly to cable television. In so ruling the Attorney General declined to consider the factual distinctions between cable and broadcast television.

12. Defendant has threatened cable TV operators in the State of Oklahoma, including plaintiffs, with criminal prosecution if they continue to carry programming containing alcoholic beverage advertising. Defendant's actions have included letters to all cable operators notifying them of the alleged illegality of the wine commercials as well as express oral and written threats of imminent prosecution. A written threat of prosecution directed to plaintiff Sammons Communications, Inc. is attached hereto as Exhibit "A".

13. There exists no feasible way for plaintiffs to block out the advertisements even if such action was legal under federal laws.

14. Failure to carry the out-of-state stations containing wine commercials would place plaintiffs in violation of their franchises, and would probably cause a large but inherently immeasurable reduction in plaintiffs' subscriber revenue.

15. Enforcement as threatened would irreparably injure plaintiffs.

16. As applied to plaintiffs, enforcement of the advertising prohibition as threatened would violate the provisions of the United States Constitution found in: Article VI (Supremacy Clause); Article I § 8 (Commerce clause); Amendment I (Freedom of Speech); Amendment XIV (Due Process and Equal Protection) and of 42 U.S.C. § 1983.

17. Concurrently with the filing of this Complaint, plaintiffs are filing a request for a preliminary injunction prohibiting defendant from attempting to enforce or assisting any attempted enforcement during the pendency of this action.

18. An actual case or controversy exists between plaintiffs and defendant entitling plaintiffs to a declaration of the rights between them and defendant under 28 U.S.C. § 2201 and Rule 57, F.R.C.P.

WHEREFORE, plaintiffs pray for the following relief:

1. Declaration that enforcement as threatened conflicts with the Constitution and Laws of the United States or is not authorized by Oklahoma laws;

2. Supplemental relief in the form of a preliminary injunction, to be made permanent at the close of this action, prohibiting defendant from attempting to enforce or assisting any attempted enforcement as threatened against plaintiffs.

[Signatures Deleted in Printing]

STATE OF OKLAHOMA

RICHARD A. CRISP
DIRECTOR AND
SECRETARY TO THE BOARD

ALCOHOLIC BEVERAGE CONTROL BOARD
2501 NORTH STILES—P O. BOX 53445
OKLAHOMA CITY, OKLAHOMA 73152—AC 405/521-3484

JOAN L. BLANKENSHIP, CHAIRMAN
ALLEN B. MORAIN, VICE-CHAIRMAN
L. WINSTON BOYDSTON, MEMBER
HEBER FINCH, MEMBER
RANDALL SPEARS, MEMBER

LETTER OF CAUTION

January 14, 1981

Station Manager
Sammons Communications, Inc.
210 N. Oklahoma
Elk City, OK 73644

Dear Sir:

Information available to this office reveals that at 2:25 p.m. on January 11, 1981, Channel 6 of your Cable Television System transmitted an alcoholic beverage advertisement. This act is contrary to Article 27, Section 5 of the Oklahoma Constitution and Section 516, Title 37 O.S. 1971.

A formal complaint will not be presented to the District Attorney for the above violation at this time; however, you are advised to take those actions necessary to preclude a recurrence of the above violation. Any further violations of this nature will result in a full report being filed with the Beckham County District Attorney with a recommendation that charges be filed and prosecuted.

Sincerely,

/s/ Richard A. Crisp

RICHARD A. CRISP
Director

AN EQUAL OPPORTUNITY EMPLOYER

Exhibit -A-

Page 1 of 1 Pages

III

PRELIMINARY INJUNCTION HEARING (EXCERPTS)

(March 6, 1981)

IN THE
UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-81-290-W

CABLECOM GENERAL, INC.; COX CABLE OF
OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.;
AND SAMMONS COMMUNICATIONS, INC.,
Plaintiffs,

v.

RICHARD A. CRISP, Director of
the Alcohol Beverage Control Board,
Defendant.

Preliminary Injunction Hearing
Had Before The Honorable Judge Lee R. West
On March 6, 1981
In Oklahoma City, Oklahoma

* * * * *

MR. FORD: All right. Mr. Crisp and Mr. Marnell and [26]
Mr. Hammack.

(The Clerk swore a group of witnesses.)

MR. FORD: Plaintiffs would call Mr. Crisp to the
stand, please.

MR. RICHARD A. CRISP,

was called as a witness, and after having been duly sworn, testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. FORD:

Q. Would you state your full name for the record, please?

A. Yes. Richard A. Crisp.

Q. And Mr. Crisp, what is your job?

A. I'm currently the Director of the Oklahoma Alcoholic Beverage Control Board.

Q. As part of your duties, do you occasionally receive complaints concerning carrying of wine advertisements on cable television?

A. Yes, sir, I do.

Q. In the spring of this past year, did you request an Attorney General's opinion dealing with the lawfulness of such advertising?

A. Yes, I did.

Q. Did you subsequently receive such an opinion?

A. Yes, I did.

[27]

Q. Did you subsequently distribute that opinion to what you saw as all operators of cable television systems in the State of Oklahoma?

A. I distributed—I distributed a copy of that opinion to approximately 110 cable television stations in the State of Oklahoma for their information.

Q. I will hand you what is marked as Plaintiffs' Exhibit 1 and ask: Is that a copy of your letter to one of those cable television systems?

A. Yes, sir, it is.

Q. And as far as you know, is that a correct copy of the letter you sent out?

A. Yes, it is.

MR. FORD: I move the admission of Plaintiffs' Exhibit 1.

THE COURT: Any objection, Mr. Jones?

MR. JONES: No. Your Honor.

THE COURT: Be admitted.

MR. FORD: May I question the witness from here, Your Honor?

THE COURT: Surely.

BY MR. FORD:

Q. In January of this year, did you have occasion to receive a complaint concerning carrying of a wine advertise-[28]ment for the system owned by Sammon's Communications in Elk City?

A. Yes, sir, I did.

Q. All right. Did you write them a letter of caution concerning such carrying of such advertisement?

A. Yes, sir.

Q. I will show you what's been marked as Plaintiffs' Exhibit 2 and ask you if that is a copy of the caution you sent to Sammon's in that instance?

A. Yes, sir, it is.

Q. For convenience and clarity, would you mind reading the second paragraph of that letter into the record for me?

A. "A formal complaint will not be presented to the District Attorney for the above violation at this time. However, you are advised to take those actions necessary to preclude an occurrence of the above violation. Any further violation of this nature will result in a full report being filed with the Beckham County District Attorney with a recommendation that charges be filed and prosecuted."

MR. FORD: At this time we'd move the admission of Plaintiffs' Exhibit 2.

MR. JONES: No objection, Your Honor.

THE COURT: Be admitted.

BY MR. FORD:

Q. Mr. Crisp, is it fair to state that you considered that both of those letters were sent as part of your official duties as [29] Director of the Oklahoma Alcoholic Beverage Control Board?

A. Yes, sir. I considered that.

Q. Do you consider the investigation of complaints within your duties?

A. Yes, sir, I do.

Q. And do you also consider within your duties the recommendation of criminal prosecution of people against whom complaints are made for violation of Oklahoma's prohibition of liquor advertising?

A. Yes, sir, I do.

Q. Do you consider yourself the primary official of the State of Oklahoma charged with investigating complaints and recommending criminal action in that circumstance?

A. Not necessarily, no, sir.

Q. But that is one of your primary duties, is it not?

A. Yes, sir, it is.

Q. Do you have any knowledge about the factual distinction, if any, between the way cable television systems operate and the broadcast systems operate?

MR. JONES: Objection, Your Honor. That is asking for an opinion this witness has not been qualified for.

THE COURT: He asked him if he had an opinion or any knowledge. The objection will be overruled. You may answer. He only asked you if you did have. [30]

THE WITNESS: I do have an understanding somewhat of the difference.

BY MR. FORD:

Q. Are you prepared to testify as to the differences between cable operations and broadcast operations here today?

A. No, sir.

MR. FORD: I have no further questions, Your Honor.

THE COURT: Mr. Jones?

CROSS EXAMINATION

BY MR. JONES:

Q. Mr. Crisp, you have testified you are the Director of the Oklahoma Alcoholic Beverage Control Board; is that correct?

A. Yes.

Q. What are your duties as the Director? Or let me restate that. What is the Oklahoma Alcoholic Beverage Control Board? What are the duties that it is charged with? Are you familiar with that?

A. Yes.

Q. As one of those duties, are you charged with enforcing the statutory prohibition and constitutional prohibition against advertising?

A. Yes, sir, I am.

Q. Have you ever arrested—Let me back up. Does the Alcoholic Beverage Control Board have the ability to arrest[31] parties?

A. Yes, sir.

Q. Have you ever arrested anyone with respect to the cable television companies carrying liquor advertisements?

A. No, sir, I haven't.

Q. Have you ever threatened anyone with arrest?

A. No, sir, I haven't.

Q. In that regard, Mr. Crisp, you indicated you would make a recommendation in your letter. You would make a

recommendation to the District Attorney's office. Who makes the final decision on whether prosecution would ensue?

A. Of course the District Attorney would make that decision.

MR. JONES: I have no further questions, Your Honor.

MR. FORD: No redirect, Your Honor.

THE COURT: You may step down.

THE WITNESS: Thank you, sir.

MR. FORD: Plaintiffs would call Mr. Ron Marnell.

MR. RONALD L. MARNELL,

was called as a witness, and after having been duly sworn, testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. FORD:

Q. Mr. Marnell, would you state your full name for the [32] record, please?

A. Ronald L. Marnell.

Q. And by whom are you employed?

A. Multimedia Cablevision, Inc.

Q. Where is your principal place of business, you personally?

A. Wichita, Kansas.

Q. What is your job for Multimedia?

A. I'm involved with the Multimedia Divisional Headquarters that is located in Wichita.

Q. Do part of your duties involve cable television systems in the State of Oklahoma?

A. Yes, they do.

Q. Would you briefly describe to me what your duties are in connection with those systems?

A. I am involved in planning, somewhat in the operation and in a supervisory manner.

Q. Would you briefly list for me a couple of franchises that Multimedia has within the State?

A. Chickasha, Oklahoma; Moore, Oklahoma; Edmond, Oklahoma; Perry, Oklahoma.

Q. Do all of those franchises carry some out of state television signals as part of their regular programming?

A. Yes, they do.

Q. Now, what stations are carried by your system from out[33] of state?

A. All of the systems carry W.T.B.S. from Atlanta, Georgia.

Q. All right. And is that Channel 17 in Atlanta?

A. Yes, it is.

Q. Do you also carry Channel 9 from Chicago?

MR. JONES: Objection, Your Honor. He's leading the witness.

THE COURT: Sustained.

BY MR. FORD:

Q. What other stations do your systems carry, Mr. Marnell?

A. We carry the Oklahoma broadcast stations that are required by the F.C.C. and that are in proximity of the communications we operate. We do also carry stations from out of state that would be from the Dallas, Texas; Fort Worth, Texas area and from Chicago carry W.G.N., Channel 9.

Q. All right. Now, do any of those stations contain in their programming wine advertisements?

A. To the best of my knowledge, those distant stations do carry wine advertising.

Q. Are you saying some of them or all of them?

A. All of them.

Q. What role, if any in your opinion, does the carrying of[34] these out of state stations have in the financial viability of your cable systems in the State of Oklahoma?

MR. JONES: Objection, Your Honor. This witness has not been qualified as an expert in that respect to make an opinion.

THE COURT: All right. Overruled. You may answer.

THE WITNESS: The carrying of distant television stations is essential to the viability of cable operations. Cable is an alternative to the broadcast televisions available off of a household antenna. The sources of programming, in addition to what could be obtained, wholly is what makes cable television viable and where it in fact got its roots.

BY MR. FORD:

Q. Are you aware of any cable systems in Oklahoma which carry only in-state signals?

A. I'm not aware of any.

Q. There are some areas in Oklahoma which, under your understanding—some cable systems in Oklahoma which, according to your understanding, are required to carry out of state signals?

A. Yes. That's true.

Q. Are you familiar with any specific area in which that is true?

A. That becomes true in the areas of the State near the [35] border of other states where the transmitters are licensed in the adjacent state and they're within the confines provided by the Federal Communications Commission to require mandatory carriage of those signals.

Q. So is it your testimony that anything near the perimeter might be required to carry an out of state signal?

A. Yes.

Q. For instance, in the northeastern area of Oklahoma, is there any system up there which must carry out of state signals?

A. Any television system operating within the 35 mile zone of Joplin, Missouri or Pittsburgh, Kansas transmitters would be required to carry those stations even though the system was located in Oklahoma.

Q. Are you familiar that there is such a system or is not such a system up there?

A. There are systems in that area operating.

Q. All right. Do you know whether or not the stations that they are required to carry contain wine advertising?

A. I can't testify specifically to those stations in that area if they carry it. I know the Kansas stations are not prohibited from carrying it.

Q. All right. Would you briefly describe for me a typical cable operation in your system as far as staffing goes and how the system runs? Just input the signal and retransmission to [36] subscribers?

A. The television signals are acquired from a combination of means. A typical system would have potentially three input sources for programming. They would be off-air, in which case the television signal is received directly by an antenna not unlike at one's home. That signal is then connected to processing equipment which amplifies and removes interference and it is placed directly on to the cable system itself, an unattended operation.

The other means of getting a television signal on to a cable system would be via microwave relay, which is a method that the Dallas signal coming into this area, they're relayed by a common carrier microwave delivered to a head-in site, which is commonly referred to as a head-in, where the signals enter the cable television system and they're transmitted throughout the cable.

And the third source would be satellite transmission, in which a satellite antenna collects microwave signals and they are then fed head-in and distributed throughout the cable system.

Q. All right. You mentioned an unattended operation as far as receipt and retransmission of the signal. What is that mean?

A. The signal comes in as a television signal, is just amplified by a piece of electronic equipment and sent directly [37] onto the cable. It does not require an operator. There are no operators involved with head-ins. In that sense, it's not a switching facility.

Q. All right. Now, are these head-ins and head-in facilities always located at the office of the cable T.V. systems?

A. No. Typically they are not.

Q. Do cable operations in your company typically have 24 hour a day staffing?

A. No, they do not.

Q. What hours are they ordinarily open?

A. Normally 8:00 to 5:00.

Q. So does that mean that normally no one is there from 5:00 in the evening until 8:00 the next morning?

A. That's true.

Q. Now, Mr. Jones indicated that the position of the Attorney General was that cable systems could delete those commercials just like broadcast systems could. Now, do you have any facts that you think bear on that question?

A. They're not similar. The television station is an attended location and is intended for switching and insertion of other signals and other sources, whereas the channels that go on cable systems are an unattended location or simply a—the cable system acts as a continuation of a conduit, if you will, to[38] carry the signal onto the subscriber's television set.

Q. What relationship, if any, is there ordinarily between the cable T.V. system and, say, Channel 9 in Chicago that it carries?

A. We have no relationship with Channel 9 as far as our—No contracts or anything. We obtain that signal through a common carrier microwave system that—retransmission through satellite, so we have no agreement with them directly.

Q. Do you pay them anything for the signal?

A. No, we don't.

Q. Do you have any advance notice of what kind of commercials they are going to carry?

A. Absolutely not.

Q. Is Channel 9 a station that cooperates with cable operations?

A. No sir. They have typically been referred to as the reluctant super station as far as cable operations are concerned.

Q. Now, what would a cable system need in order to be able to delete these wine commercials as they came in?

A. It would be my opinion that they would need an operator to monitor the signals coming through rather than just having them come through unattended on every channel that you are going to monitor those commercials and attempt to[39] delete them as they appeared on the screen through some means.

Q. All right. Now, is what you are saying that for every signal from out of state you carry, you have to have a person watching that ready to push a button?

A. Yes, you would. You would have no other way of knowing—I mean, you wouldn't know when it was coming, so you'd have to have someone monitoring it continuously.

Q. Now, as far as out of state and independent stations go, are there any available to the satellite that don't include wine advertising?

A. No. Currently those that are distributed via satellite, there are only three available, and to the best of my knowledge, all three do carry wine commercials.

Q. Now, do you know how it is that the broadcast stations are able to delete wine commercials?

A. They are directly affiliated with the network that provides them their programming sources and have a highly cooperative nature of that contractual agreement. They are designed as an advertising medium, and the method of sharing time for the commercials dictates that they have that tight rein for notification.

Q. Now, what kind of a broadcast day, how long do these satellite stations have?

A. The satellite stations that are carried are 24 hour a day[40] stations.

Q. Is that true of the commercial networks, A.B.C., C.B.S., N.B.C.?

A. At this time it's not.

Q. Do you know how long a broadcast day those networks typically have?

A. They typically come on in the early morning in the 7:00 o'clock area and they typically end anywhere from 11:00 to 12:00 o'clock at night.

Q. Is there any difference in the number of commercials that are likely to be carried between these independent stations and network originated commercials?

A. I believe you will find the independent stations will carry a larger number of commercials than the network stations do.

Q. All right. So is it your testimony that they have a larger number of commercials and longer broadcast day?

A. Yes, they do.

Q. Now, are you aware of any of the so-called super stations, the out of state independents that are brought in, that give cable systems in Oklahoma advance notice of when wine commercials are going to show up?

A. No, they do not.

Q. What effect, if any, does that have on your opinion about the feasibility of deleting those commercials? [41]

A. It's extremely impractical to try to delete.

Q. I'm sorry. I missed that. Did you say it was impractical?

A. It's impractical, yes.

MR. FORD: No further questions.

THE COURT: Mr. Jones, with my apologies, I want—if we could, I have another rather important matter I need to

take care of that shouldn't take but just a few moments. Before you take your cross examination, could we take a brief recess? I hope it's not more than about five minutes, gentlemen.

(A recess was had, after which the following proceedings were had in open court.)

THE COURT: Be seated, please, gentlemen. I apologize for the interruption. Go ahead, Mr. Jones. You may cross examine.

CROSS EXAMINATION

BY MR. JONES:

Q. Your name is Mr. Marnell?

A. Yes.

Q. Okay. Mr. Marnell, you have testified that there are three ways of picking up a signal; is that correct?

A. Yes. Typically that is true.

Q. I believe you said there was antenna, microwave and satellite; is that correct?

[42]

A. Yes.

Q. Are all three of those considered C.A.T.V. systems by the F.C.C.?

A. I don't think I understand your question.

Q. Are all three of those types of modes of input, are they considered C.A.T.V.'s? Are you familiar with that term, sir?

A. I'm familiar with C.A.T.V. and what the Federal Communications Commission considers a cable television system, but those individual elements by themselves aren't—You know, they are what they are.

Q. Are all three forms considered cable television? The antenna, the microwave and the satellite?

A. Not of itself, no.

Q. Okay. The signal you said is received by either placing a large antenna; is that correct, or having a microwave dish to pick up a microwave signal?

A. Yes.

Q. Or by having some type of receiver from the satellite; is that correct?

A. True.

Q. These signals do not come directly to the viewer; is that correct?

A. They are carried to the viewer through a means of cable and amplifiers. [43]

Q. Okay. The signal that the cable television system is sending out is not the same signal that the cable television system is receiving; is that correct?

A. Yes. It is the same signal. It cannot—You cannot—Excuse me. You cannot alter those broadcast signals by the F.C.C. rules, so it is the same signal.

Q. Let me clarify it, Mr. Marnell. You have testified that the signal that is received by the cable television system is amplified; is that correct?

A. Yes.

Q. What else is done to that signal before it is sent out to the viewer?

A. Nothing at that point. It goes onto the cable television system for distribution.

Q. Directly a means of amplification? Do you also take out static and refine that signal before it is retransmitted?

A. Okay. I think I know where the confusion in terms is. When I said "processing," that is the amplification unit. It just takes adjacent signals out of the transmission lines so it is clean and one channel doesn't interfere with another. That is why it is called—It is processing, is what it is called.

Q. All right. During the process—or the processing[44] period, is it technologically feasible to place some sort of monitoring device in there?

A. Yes. A standard television receiver would monitor, you know, a television transmission.

Q. Okay. Between the time the signal is received, it goes into a processing; is that correct?

A. Yes.

Q. And then it is retransmitted?

A. Yes.

Q. During that processing time, is it possible to monitor that signal? Is it technologically feasible to monitor that signal before it is retransmitted?

A. You could get a—either a wave-form monitor—You could get monitors and monitor it, yes.

Q. So it is possible?

A. It would be possible to monitor.

Q. You have stated it is impractical, but it's not impossible; is that correct?

A. Yes.

Q. I believe you stated, Mr. Marnell, that cable television stations receive no revenues from advertisements; is that correct?

A. They receive no revenues from the advertisements that are carried on those broadcast stations, no, they do not.

Q. So as far as an economic effect, whether or not that advertisement is shown does not really touch that cable tele-[45] vision company; is that correct?

A. The advertisement? We get no revenue from those advertisements, no.

Q. So you're not affected whether the commercial is shown or not in an economic sense; is that correct?

A. I guess that would be true.

MR. JONES: I have no further questions, Your Honor.

MR. FORD: Just a few questions on redirect.

REDIRECT EXAMINATION

BY MR. FORD:

Q. Now, Mr. Jones was talking some about processing and the time during which processing takes place. Is there any

delay between the time the signal comes in and when it is retransmitted to the viewers?

A. No. They are instantaneous. The viewer is seeing it at their home at the same time you would see it at the editing site.

Q. So you weren't implying that there was any time in which something could be done to that signal?

A. No.

Q. Now, you also talked about the three types of signals, microwave and satellite and et cetera, and he asked if those were cable T.V. systems. Now, are those all three means of receipt that cable T.V. systems use?

[46]

A. They are sources of signals that cable systems utilize, yes.

Q. The use of any one of those systems doesn't prevent you from being a cable T.V. system under Federal Communications regulations?

A. No.

Q. Now, you testified that you don't get any economic benefit from those wine commercials being included in the telecast; is that correct?

A. That's true. We get no revenues from those advertisers.

Q. Would there be an economic effect on you if you were required to take them out?

A. Yes. A very heavy economic effect would be in the ability to remove those commercials.

Q. Now, is that what we talked about on direct, having someone sitting there to push a button for each station you carry 24 hours a day?

A. Yes, it was.

MR. FORD: No further redirect.

RECROSS EXAMINATION

BY MR. JONES:

Q. Mr. Marnell, with respect to deleting, you indicated that the signal is brought down, processed and retransmitted and that takes place instantaneously; is that correct? [47]

A. Yes, it does.

Q. Are you familiar with how regular broadcasters operate?

A. I'm not a broadcaster, but I am in a general sense familiar with it, yes.

Q. Are you familiar with how they go about blocking out signals?

A. In a general sense, yes.

Q. Is that a signal that is simultaneously being received and transmitted?

A. At portions of the time, it is, yes.

Q. So it's possible then for C.B.S., N.B.C., A.B.C., one of the national networks, to send a signal and that signal is being transmitted at the same time it's being received by the local affiliates; is that correct?

A. That's true.

Q. And the local affiliates does have the capability for blocking a portion of that signal as needed; is that correct?

A. Yes. When he knows precisely when that signal will be there and has the facilities to do so and the manpower to effect it.

Q. Do the national networks ever make any changes in their advertising schedules from what they publish? Do they [48] ever deviate?

A. I would assume they do.

Q. And if that were the case, isn't it possible for a wine commercial to be shown at the national level that the local affiliate would not be aware of?

A. I would think that could happen.

Q. And don't you think the local affiliate would have someone to monitor for that specific purpose?

A. I don't think I can answer that. I don't know how they handle that.

Q. Okay. As far as the economic impact, you receive no revenues from advertising and yet you have indicated there would be an impact if you were called upon to delete those advertisements; is that correct?

A. The economic impact would be if we deleted those advertisements, if we were the ones required to do it. If they simply didn't appear on the channel, then we would not have an economic impact because we have no income from those advertisements.

Q. Do you have any viewers that watch cable television specifically to see wine commercials?

A. I would think that would be unlikely would be my answer.

Q. Do you think that you would suffer a loss of viewers if wine commercials were deleted from the signals that you are[49] retransmitting?

A. From purely the deletion of the commercial itself, I wouldn't think so.

MR. JONES: I have no further questions, Your Honor.

MR. FORD: Thank you, Mr. Marnell.

THE COURT: Let me ask Mr. Marnell a question or two.

THE WITNESS: Yes, sir.

THE COURT: You are with Metromedia?

THE WITNESS: Multimedia.

THE COURT: Multimedia? I apologize, Mr. Marnell. What states does your—Your principal place of business is in Wichita?

THE WITNESS: Yes.

THE COURT: And how many states do you have cable T.V. into?

THE WITNESS: We currently have cable television operations in Oklahoma, Kansas, Illinois and North Carolina.

THE COURT: All right. Do any of those states have comparable either constitutional or statutory prohibitions against the advertising of wines?

THE WITNESS: To the best of my knowledge, they do not, Your Honor.

[50]

THE COURT: No other state, to the best of your knowledge, has threatened or inferred or implied that you will or might be prosecuted for failure to delete or refrain from those wine advertisings to your knowledge?

THE WITNESS: To my knowledge, this is the only case. This is the only one.

THE COURT: Okay. The matter hasn't come up so far as you know in any other state?

THE WITNESS: No, it has not.

THE COURT: All right. Fine. Any further questions, gentlemen, as a result of my questioning?

MR. FORD: No.

THE COURT: Go ahead, Mr. Jones.

RECROSS EXAMINATION (Continued)

BY MR. JONES:

Q. Mr. Marnell?

A. Yes.

Q. Are you familiar with whether or not any pornographic materials are ever shown on cable television?

MR. FORD: Your Honor, I will object to this as being irrelevant, although I really don't mind hearing it too much, but I don't think it's relevant to this proceeding.

MR. JONES: I think it's relevant, Your Honor, in that if we carry the Plaintiffs' argument to its natural— [51]

THE COURT: Are you talking about pornographic advertising or—

MR. JONES: Any type of pornographic materials which would violate the community standards of the State of Oklahoma. If you take the Plaintiffs' argument to its natural conclusion, then you could indicate that they don't have any affect on any signals which are received, so if pornographic—

THE COURT: They're only transmitting, as I understand it, signals that are transmitted by the major networks, received in some other source, and so I think that the question is irrelevant because those are controlled by F.C.C. regulations and so forth.

MR. JONES: Theoretically it would be possible, Your Honor, for the Atlanta station or Chicago station to show some kind of programming that might comply with the community standards there but be in violation of the obscenity laws here. And I was just wondering if in fact they have any means of monitoring to preclude showing a program here that would violate our standards.

THE COURT: All right. I think we are getting outside the issues that are before us here, which is difficult enough—

MR. JONES: Okay, Your Honor. [52]

THE COURT: —without getting the pornography involved. All right. Do you have any further questions?

MR. FORD: No further questions, Your Honor.

THE COURT: You may step down, Mr. Marnell.

MR. FORD: We call Mr. Wilbur Hammack.

MR. WILBUR L. HAMMACK,

was called as a witness, and after having been duly sworn, testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. FORD:

Q. Mr. Hammack, would you state your full name for the record, please?

A. My name is Wilbur L. Hammack.

Q. Mr. Hammack, by whom are you employed?

A. I'm employed by Cablecom-General, Inc.

Q. What is your position with Cablecom?

A. I'm an Area Manager in Altus, Oklahoma.

Q. What are your responsibilities as Area Manager?

A. I'm in charge of the operations of six cable systems three of them in Oklahoma, Altus, Mangum and Hobart, Oklahoma.

Q. How long have you been in the cable television business?

A. Since 1957. In the Altus area since 1958.

Q. Now, are either of the stations in Oklahoma that are subject to your jurisdiction required to carry an out of state[53] signal as part of their programming?

A. Yes. Mangum—I mean Hobart and Altus are required to carry two stations out of Wichita Falls. They are called significantly viewed channels.

Q. Now, is there any prohibition that you know of against those stations carrying wine advertising?

A. None that I know of.

Q. Does your—Do your stations carry any other out of state signals?

A. Yes. We carry Channel 11 from Dallas-Fort Worth. We have carried that since about 1973. One of our company's systems, they have carried it long before that. I'm not sure, but I think it's back in the early '60's sometime. We carry W.T.B.S. in Atlanta and we also carry W.G.N.-Chicago, Channel 9.

Q. Does Channel 11 out of Dallas-Fort Worth include wine advertising as part of its commercials?

A. I have seen wine commercials on their station, yes.

Q. Would you briefly describe for me what the staffing you have at the Mangum and Hobart locations is?

A. I have one man in each town who is the manager, the technician, the installer, the community relation man and everything.

Q. Is that true in both of those towns?

[54]

A. Yes, it is.

Q. Does he work 24 hours a day?

A. Well, I certainly hope not.

Q. All right. Would you briefly describe for me what the facilities you have for receiving and retransmitting signals are in Hobart and Mangum?

A. We have 400 foot towers in each instance. We have antennas at the top of the tower which receives signals from Channels 3 and Channel 6 out of Wichita Falls. They are then processed in a piece of equipment inside the tower building, amplified, put into the cable system. We receive some satellite signals, W.G.N., Atlanta from a satellite receiver, by microwave. We bring in Channel 11 and Channel 39 out of Dallas-Fort Worth, and they are processed—each are processed slightly different, but mainly in the same way and put at the proper levels into the cable system whereby they are transmitted throughout the system into the cable subscriber's home.

Q. Now, are there personnel that are stationed out there at that tower building where the signal is retransmitted?

A. No, sir. Many of our locations are extremely remote. Our microwave locations, for instance. The towers in those towns are anywhere from a mile and a half, two miles to three miles outside the city limits.

Q. Is there any way your office manager in Hobart or Mangum sitting there in his office could modify that signal[55] before it is retransmitted?

A. No. Our offices are in town and they have a cable running into the office, just the same as our cable subscriber would be anywhere in the town. They can look at the picture on a television set and that is all.

Q. Now, who would be impacted if you were required to cease carrying those out of state stations?

A. Well, our subscribers would be deprived of the signals that they learned to like very much, some of the older movies and sports programming on these stations that are distant, and I'm afraid we'd have a very unhappy group of people in any of those towns if we were to have to remove those signals.

Q. Have you promised to carry those signals to those people?

A. Yes, we have. Most definitely.

Q. In fact, is that promise in your franchise agreement with those cities?

A. Yes, it is.

Q. Are you aware of any cities in Oklahoma where if they were forbidden from carrying out of state signals that they'd just simply have no television at all?

A. Well, I think definitely there would be some towns. I can think of primarily of Guymon, Oklahoma. Our company has for years served that town with microwave service from the [56] three television signals out of Amarillo, Texas, and until recently, when the Oklahoma Educational Television Authority built a series of translators across the Panhandle of Oklahoma out in that direction, they had nothing except the microwave signals our company furnished them out of Amarillo, Texas which could—I don't know that they did advertise wine advertisements. I think in Guymon they did have a station out of Kansas, a satellite. That is called a satellite. Not from a satellite out in space, it's just a station that retransmits signals I believe of Wichita, Kansas. But I'm not certain.

Q. Now, do your systems have any contractual relationship with the stations whose signals they carry?

A. None whatsoever.

Q. Do you send a check to those stations to pay them for carrying their signal?

A. No, sir, we do not.

Q. Do they ever consult you on the programming they carry?

A. No, sir, they do not.

Q. Now, do you have any way of knowing in advance what commercials are going to be carried or when?

A. Never.

Q. Do you have any kind of a teletype hookup with the stations you carry so that they could tell you if they were[57] changing their schedule?

A. None.

Q. Do you know whether broadcast stations do, the network affiliates?

A. I understand they do. They have some kind of a communication that comes into them from networks telling them what commercials may be coming up in case they have to delete them. That is only hearsay. I don't know it firsthand.

MR. FORD: All right. That's all the questions I have, Your Honor.

CROSS EXAMINATION

BY MR. JONES:

Q. If I understand you correctly, Mr. Hammack, you have several franchises that you operate as a cable television company; is that correct?

A. Yes, sir.

Q. In those franchise agreements, who are they normally with?

A. With the local government entity.

Q. Are you talking about the municipality?

A. That's right.

Q. Do those agreements purport to exclude you from the prohibition against liquor advertisements?

A. Would you say that again, please?

Q. Does your franchise agreement immunize you or [58] exempt you from the prohibition against liquor advertisements in the State of Oklahoma?

MR. FORD: Your Honor, I believe we'd be willing to stipulate that none of these franchises have a provision in them that says this exempts you from the laws of the State of Oklahoma regarding liquor advertising.

THE COURT: Let the record so show.

BY MR. JONES:

Q. Mr. Hammack, you say that you have no staffs on outlying towers; is that correct? Antennas?

A. No, sir.

Q. Are you saying it's impossible to have someone to staff those, if necessary?

A. I would say it would be impractical, not impossible.

Q. The question was: Is it impossible, sir?

A. No, it's not impossible.

MR. JONES: I have no further questions.

MR. FORD: No redirect, Your Honor.

THE COURT: Mr. Hammack, let me ask you a question or two: How many counties in the State of Oklahoma does your company serve?

THE WITNESS: I can tell you the cities easier, I believe.

THE COURT: Okay.

[59]

THE WITNESS: We have a cable system in Ponca City; Miami, Oklahoma; Ardmore, Oklahoma; Idabel, Mangum, Hobart and Altus.

THE COURT: Pretty well ring the state then, don't you, to some degree?

THE WITNESS: Yes. We started in the outlying areas. That is where cable began.

THE COURT: Have any charges been filed against you for violating the state prohibition against liquor advertising?

THE WITNESS: No, sir.

THE COURT: Have any been—Has any District Attorney or local governmental entity indicated to you that they were considering the filing of charges?

THE WITNESS: No, sir, they have not.

THE COURT: To your knowledge, has any other cable television company operating in the State of Oklahoma, has it been prosecuted under this—for violation of this prohibition?

THE WITNESS: I only know that Elk City was put on caution, not prosecuted.

THE COURT: Elk City was put on caution?

THE WITNESS: Yes.

THE COURT: Was that by the letter that—

THE WITNESS: Yes.

[60]

THE COURT: —that's been referred to?

THE WITNESS: I had heard about it.

THE COURT: In Beckham County?

THE WITNESS: Yes. I had heard about it before I saw the letter.

THE COURT: That was a letter from the Alcoholic Beverage Control Board; is that correct?

THE WITNESS: Yes, sir.

THE COURT: Do you know whether the local District Attorney ever indicated to them any intention to prosecute that or not?

THE WITNESS: No, I do not.

THE COURT: You don't know? You don't have any personal knowledge?

THE WITNESS: No, I don't.

THE COURT: Gentlemen, do either of you have any questions with regard to this witness since I have examined him?

MR. FORD: No, Your Honor.

MR. JONES: No, sir.

THE COURT: You may step down. See if Mr. Ford has additional witnesses?

MR. FORD: Your Honor, just a brief—We don't have any more witnesses, Your Honor, so that this point we would rest as far as our presentation. [61]

* * * * *

IV

**ORDER OF THE
SUPREME COURT OF THE UNITED STATES
GRANTING THE PETITION
FOR A WRIT OF CERTIORARI
(October 3, 1983)**

Supreme Court of the United States

No. 82-1795

CAPITAL CITIES CABLE, INC.; COX CABLE
OF OKLAHOMA CITY, INC.; MULTIMEDIA
CABLEVISION, INC.; and, SAMMONS COMMUNICATIONS, INC.,
Petitioners,

v.

RICHARD A. CRISP, Director,
Oklahoma Alcoholic Beverage Control Board,
Respondent.

Order Allowing Certiorari. Filed October 3, 1983.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

In addition to the Questions Presented by the petitioners, the parties are directed to brief and argue the following question:

“Whether the state’s regulation of liquor advertising, as applied to out-of-state broadcast signals, is valid in light of existing federal regulation of cable broadcasting.”